How to guarantee the "universal service" in the telecommunication sector : the "Management contract" belgian solution : a critical approach. CEPS Seminar, Brussels, 6 April 1994

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How to guarantee the "universal service"
in the Telecommunication sector:

THE "MANAGEMENT CONTRACT"
belgian solution*

A CRITICAL APPROACH

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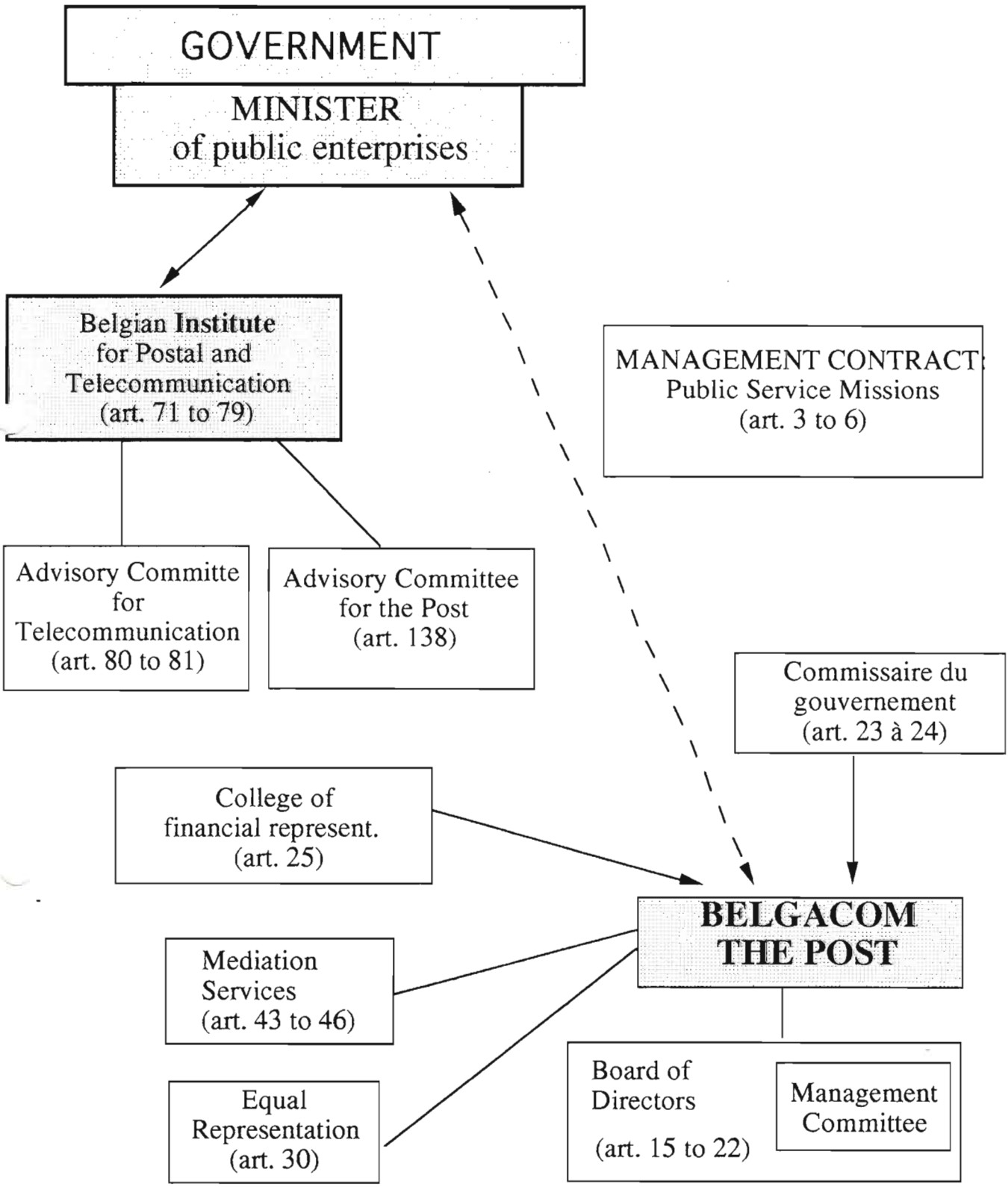
POSITIONING OF THE MANAGEMENT CONTRACT IN THE "INSTITUTIONAL LANDSCAPE"



INTRODUCTION

In order to ensure on the one hand " the competitivity of public enterprises in their activities open to competition " and in order " to improve the conditions in which they ensure their public service missions " [0], the Act of 21 March 1991 on the reform of certain public economic enterprises [1] creates a new category of public enterprises, " Entreprises Publiques Autonomes " (Autonomous public enterprises or EPAs)[2] which have a real management autonomy as well as a new legal instrument, the management contract, which is entered into by the State and each EPA. This " contract " governs the way in which the EPAs are to perform their public service missions.

Article 1 of the Act of 21 March 1991 on Autonomous Public Enterprises makes the autonomy of the public enterprises aimed subject to the signature of a management contract. The management contract is therefore the cornerstone of the new status of these public enterprises. It must enable to reconcile the neccessities of a high performing public service with the respect for a management autonomy. It is therefore at the centre of an equilibrium which is difficult to achieve between public utility (the legitimacy of an EPA) and performance (effectiveness and efficatious/efficiency of an EPA).

The concept is new even if in Belgium and elsewhere it follows a trend to increasingly contractualize the relations between the State an the economic actors. The flexibility of the contractual method from the point of view of its contents, capacity of adaptation and respect of the contracting actors' interests render this instrument attractive.

Our aim is to go beyond the slogans which legitimize and justify the concept and to cast some light over the significance and the limits of the management contract as a method of regulating the public service and more particularly within the telecommunications sector.

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[0] Doc. parl., Chambre, n°1287/1-89/90, p.3.

[1] Monit. 27 March. Referred to below as " the Act " or " EPA Act ".

[2] Are more directly concerned at the present time (article 2§2 of the EPA Act): the public controlled airline company (la Régie des voies aériennes), the National Railway Company (Société nationale de chemins de fers belges), the public controlled Postal company (Régie des Postes)_ The Post, Telegraph and Téléphone Company- Belgacom.
More generally, in the future, " each public interest body shall have a management autonomy in a given industrial or commercial sector, can,..., obtain such autonomy by entering a management contract ... "(article 1§1 of the EPA Act.

I. THE MANAGEMENT CONTRACT AS SUCH

1.Definition

The management contract can be defined as an agreement entered into by the State and a public enterprise and which determines the special rules and conditions that shall be followed by the autonomous public enterprise in order to carry out the public service missions that are entrusted to it by law.

2. Subject matter and function

The Subject matter of the management contract is to jointly determine the way in which the public service missions are to be performed. In so doing, it seeks to ensure and safeguard the general interest by detailing the public service missions on the one hand and by providing, if the case arises, the tasks which would " probably not be spontaneously performed if its only interest, in particular its financial interest was to be taken into consideration " on the other hand. The three rules of public service i.e. the rules of change, continuity and equality should therefore be given a concrete expression in the management contract and applied to a specific fonctional public service.

While safeguarding the public interest, the management contract also seeks to ensure a certain form of management autonomy (one of the major aims of the reform) for EPAs , that is to say of its management organs within its public service missions by associating them to the determination of the tasks which are to be carried out.

Furthermore, it can also be added that the management contract enables " the general and indistinctive supervision, organized by the Act of 16 March 1954, to be replaced by a control centered on the main responsibility of the public authorities: the performance of public service missions which are dictated by the general interest ". The control of a given EPA by the competent Minister, which is in practice carried out by a governement representative, shall primarily concern the respect of the management contract

3. Contents

The management contract defines (article 3§2 of the EPA Act) the public service tasks, i.e. the precise activities which are to be carried out by the EPA in

order to ensure that these public service missions are put into practice, their price rate, the financing which is to come from or benefit the State and the rules of conduct to be observed vis-à-vis the customers. On top of this, sanctions must necessarily be included in case the undertakings taken in this management contract are not respected.

Provided " the case arises " ,throught the management contract, the Government will be able to erode the management autonomy of the public enterprise either in matters concerning public orders or real estate operations or in the financial structure of the public enterprise or the sharing of profits. Furthermore, the management contract determines the elements which must be contained in the enterprise plan.

4. Negociation -signatures-adaptations

The procedure for concluding the management contract is described in article 4 and following of the Act: subject to certain prior " consultations ", from one part, the State, represented by the Minister, who is in charge of a given public enterprise [Minister assisted by the Supervisory Authority {The Belgian Institute for Post and Telecommunication (I.B.P.T.)}] and from the other part, the EPA represented by its Managing Committee which, according to article 5§3 has the initiative of the project, negociate the contract which must be approved on the one hand by 2/3 of the votes cast in the Board of Directors and on the other hand by the King by a decree taken by the Council of Ministers.
The royal decree suspends the entry into force of the provisions of the management contract.

It must be noted that in the absence of consent, the old contract is automatically extended beyond its term. Once the contract has been extended for one year, the Government will provisionally and unilaterally determine the applicable rules concerning the contents of the managing contract which will amount to a new management contract up until the entry into force of a new management contract conluded in accordance with the procedure described above (article 5§3 of the EPA Act).

The term of the contract which can vary between 3 and 5 years (article 5§2 of the EPA Act), requires furthermore annual assessments and even adaptations. If these adaptations are not only the simple application of objective parameters contained in the managing contract in order to adapt it to the modifications of the

market conditions and to the technical developments, (" slight adaptation "), the procedure described above will have to be complied with (" heavy adaptation ") (article 5§1 of the EPA Act).

5. Legal nature

The answer to many questions will largely depend on the legal nature of the management contract : what is the recourse of a competing company if, while performing the management contract, Belgacom extends its privileges or competences and what would the consequences of such a recourse be ? What would happen if Belgacom or the State failed to respect its contractual undertakings ? What is the value of the management contract in the hierarchy of norms etc? It must be stressed at this stage that for a somewhat definite answer to these questions, we shall probably have to await decisions by the courts and the " Conseil d'Etat ".

Instead of adopting the traditional solution of regulating the public service missions by enacting a law, royal and/or ministerial decrees, the Belgian legislator in the EPA Act preferred to adopt a solution which it expressly qualifies as contractual, which would thereby imply that it would escape the jurisdiction of the administrative Court, the " Conseil d'Etat".

If a legal action is initiated by an EPA against the State, the civil courts will therefore have juridiction.
However, concerning actions filed by the State against an EPA, the commercial courts will be competent since article 8 of the Act provides that " the acts of autonomous public enterprise are deemed to be commercial ".

The nature of the sanctions is an open question. Article 3§2 of the EPA Act which excludes all express resolutive clauses, favours the performance of the contract and if the case arises, compensation. Any additional sanctions are left to the imagination of the parties (see below).

In any event, the contractual nature of the relation between the Government and the EPA excludes any sort of criminal or administrative sanction. Furthermore, in so far as Belgacom is concerned, legal provisions concerning the limitation of liability for the performance of its public service missions prohibit any form or contractual originality in this field. Last, the total or partial

withdrawal of the legally granted " concession " requires a parlementary procedure.

The contractual option chosen by the legislator is surprising since certain details contained in the Act lead to believe that it is an admininstrative type of act.: the Government who enters the agreement is acting out of general interest; the publication of the management contract pursuant to article 6 of the EPA Act seems to give it the value of an undertaking towards the whole of the collectivity; the management contract is approved by royal decree, the list of subjects regulated by the management contract is limitatively provided by the Act and does not allow the total expression of the will of the parties...

At present, because of the choice of the legislator, the pinciple of privity of contract shall prevail. But all the problems are not necessarily solved.
As such, it could be imagined for example that Belgacom's management contract asks it to carry out as public service tasks certain activities which go beyond its legal monopoly.
Indeed, it must not be forgotten that for Belgacom, all activity which is of public utility (and therefore in principle all that is provided under the management contract) is also its monopoly (combination of articles 58 and 82 of the EPA, see below) and consequently it can be said that everything that is covered by the management contract is under a monopoly even if this does not conform with a strict interpretation of Title III. If such was the case, the competitor or the company who could not provide the described service, could , rely on national or community law, to seek redress for this extension of competence. The action would be founded primarily on the grounds of unlawfulness or excess of authority of the granting of such a privilege and shall therefore seek to hear the effects of the contract provisions declared void because contrary to the law.

Furthermore, two questions must be raised: first, does a third party have grounds to attack a provision of the management contract as such and second, could it rely on this provision during the course of litigation with an EPA ?

In so far as the first question is concerned, the third party will only be able to rely on the theory of the " actes détachables ", concerning the respect of the administrative procedures which govern the signature of the contract (no publication, no royal approval, no advice given by the representative commissions) which grants jurisdiction to the administrative section of the Conseil d'Etat .

What will happen to the management contract if the action is successful before the Conseil d'Etat ?

The legal works of Prof. ORIANNE in the field of " concessions " (government licences) lead to the formulation of the following answer: " Through the theory of the so called " detachable " acts, final unilateral acts which surround the signature of the contract could be brought before the jurisdiction of the Conseil d'Etat, but the annulment of these acts can however no lead to the annulment of the contract as such ". However, if the royal decree which approves the management contract is declared void, the entry into force of the latter will be impeded.

On the other hand, a further question can be raised concerning a third party relying on the povisions contained in the management contract during a dispute with Belgacom. In a related area, it is generally accepted that third party users of the licensed public sevice can rely on the provisions contained in the job specification. Could they also do so in so far as a management contract is concerned ? Indeed, " to conclude that third parties would have no grounds to require the respect of contractual provisions, even when the contents concern them more directly (...) appears unfair and the rights of the users would be largely restricted ".

A positive answer would be easy to give if the management contract had a reglementary nature. However, is the answer necessarly negative because the Act itself provides that the management contract has a contractual nature, as defended by the Government ?

According to us, the answer could be positive even if this view is followed, pursuant to the " third party beneficiary " theory (stipulation pour autrui), provided by articles 1119 and 1121 of the civil Code. Because the Government negociates in the general interest, and in particular in the general interest of the users, this would grant them a direct and immediate right. In this way, the users would become third party beneficiaries of the undertakings made by Belgacom to the State, and they would therefore have the right ot invoke the provisions contained in the management contract in the course of litigation with Belgacom before the commercial jurisdictions.

II. THE MANAGEMENT CONTRACT : CRITICAL VIEW OF THE MAJOR LEGAL OPTIONS

1. The major legal options

In our opinion, the major legal options behind the management contract are the following:

a)the management contract is based on a dichotomic view of the activities carried out by a EPA : the public service activities on the one hand and the activities in competition on the other hand;
b) the management contract adopts a contractual method of regulating the public service.

Each of these options is criticised.

2. The dichotomic view

The principle behind the management contract is that public service activities, and in the case of Belgacom, monopolistic activities, are the only activities which are the object of a specific concerted regulation between the EPA and the State representatives.

This dichotomy raises a few problems because it is often difficult to define a strategy of the company, the plans which are necessary for its success, for the only public services without taking into consideration the competing sevices which are linked to the development of the public service activities. As such, how could a government really define the subsidies which are to be granted for the development of a wide band infrastructure (public service) if it has no information or only incomplete information concerning Belgacom's policy on the development of multimedia services (competing services) using this infrastructure.

Furthermore, if one of the objectives of the Begian government is to develop, through an EPA, R&D in the telecoms field, the management contract will not be of any help since it is obvious that in such a small country as Belgium, a R&D policy is only possible in areas which are open to competition.

The French contract plan, in so far as it covers the entire activities of France Telecom, answers the objections raised, at the expense of the public enterprise's autonomy.

3. Contractual method

Apart form the insecurity with which the contractual qualification of the management contract is affected (see above, 1.5), the method of using a contract to organize the implementation of public service missions can be the subject of certain criticisms.

First, there seems to be a contradiction in terms to organize a task of general interest by contract, that is to say by a document which is in principle subject to privity i.e. limited to the parties to the agreement (1.5)

Furthermore, we agree with D. DEOM's observation that " on a conceptual point of view, the contractual method (...) seems to entail an important disadvantage. It implies indeed that the public service duties come from requirements which are external to the public interest body and they fall outside its own rationality. In this perspective, the public interest body builds in a certain way its own logic all around economic efficiency , the other imperatives assigned to it appear as external correctives, the ultimate responsibility and the financial weight of which fall on the national government. In our opinion however, the requirements other than the financial efficency imperatives are an integrate part of the reason for being a public interest body ". In the same line of thought, Ph. QUERTAINMONT notes that " there is a risk of seing the tasks of public interest sacrificed to purely economic logics ". In our opinion, this is a real danger even the more in a european context with increasing competition, autonomous public enterprises will have to fight more and more in order to survive. These criticisms appear to have been foreseen in the preamble in which it is said that the public service tasks are activities which the public enterprise would not spontaneously carry out itself.

These criticisms must be taken even the more seriously when it is seen the amount of information which is given to the EPAs which puts them in a n incontestable position of strength during the negociation with the respective Ministers.

This imbalance will probably become even more important when, in an increasingly competitive context, the public operators will become even more reluctant in the future than they already are to provide the necessary information to the government in order for it to adopt its position. This problem is only slightly solved by the possiblity to adopt provisional measures equivalent to the management contract if an agreement is not entered into by a EPA and its Minister.

Finally, on a more formal point of view, concerning the signing procedure of the management contract, we regret with an intervener at the infrastructure Commission of the House of Representatives the absence of parliamentary control during these negociations. Beside the problems concerning the Parliament's budgetary prerogatives raised by the intervenor (yearly budget, management contract lasting more than one year; Parliament's refusal to adopt the expenditure of the State budget), would the importance of the contents of the management contract not warrant a parliamentary discussion (see for example the implementation plan of the RNIS, the tariffication,...) ?

III. THE MANAGEMENT CONTRACT FACED WITH THE DEVELOPMENT OF THE TELECOMMUNICATIONS SECTOR

1. Introduction - Plan

This third section seeks to be prospective : Will the criticisms which have already been pointed out vis-à-vis the method and the subject matter of the management contract be amplified or will even other criticisms arise because of the developments of the sector on the one hand and within this sector the subject matter of the public sector which is already referred to as a universal service.

Our aim is therefore:

-to define the sector's main lines of evolution : liberalization, privatization and internationalization (2);

-to put into evidence what can be referred to as an explosion of the universal service (3);

-to analyse the strengths and weaknesses of the management contract in the light of these tendencies and in order to guarantee in the most adequate way as possible the universal service in the plural (4).

2. The main lines of evolution in the telecommunications sector

The evolution of technology, mainly linked to the digitalization and compression, which enable the convergence between the audiovisual and the telecommunication world as well as the explosion of the so called multimedia shall accelerate the three tiered evolution mentioned above: the liberalization of the sector, i.e. the progressive disapearance of monopolies; the privatization of the public operators, in so far as the acquisition of suffisant sizes appears to be a prerequisite for survival of the operator in a field where all sectors are in competition with each other; last, the internationalization of markets and the actors.

Each of these evolutions raises difficulties in relation to the legislator' s choices which are reflected in the EPA institution and the management contract.

The liberalization destroys the subject matter of the Belgacom management contract. What will its purpose be tomorrow when the monopoly , the only legal subject matter possible according to the management contract, will be eroded or even have disappeared ? The multitude of suppliers in a liberalized public service and the liberalization of the data transport service in 1993 illustrates this, requires the definition of new regulation methods (in this case, a job specification) which should enable to coordinate the offers of suppliers and to impose on them a performant public service. Last, in a liberalized context, the financing of a loss making public sector activity will become an even greater issue.

The privatization of Belgacom will increase its autonomy. At present, because the members of the Board of Directors are exclusively appointed by the Government, this enabled to ensure a common awareness of both negociators in favour of the general interest which made the signing of the contract easier. In the future, the privatization (which will probably go beyond the present legal limits) will destroy this common interest and the following questions will become important issues: " How will a private company become interested in investing in public service missions?; How can they be compelled to provide the necessary information to define the public service tasks ? " and " How can it be seen that these missions are correctly carried out ? ".

At last, the internationalization of the actors and the market will probably make the answers to these questions raised in relation to the privatization even more difficult.

3. The explosion of the universal service

The same technological evolution already mentioned contributes to a real explosion of the " public service " re-named " universal service " in order to illustrate the wish to no longer link its exploitation with the existence of a public operator.

This universal service changes and becomes wider every day. The evolution of the universal service in line with the progress of technology explains why tomorrow the public or universal service of voice transport shall contain options such as the identification of the caller, the transfer of the call, the automatic re-dialing, and many others.... This identical evolution explains substitution phenomenas: as such the registered service which was a postal service in the past could tomorrow, with the registered fax or electronic mail, enter the telecommunication sector.

More important still, the fact that the objects of the universal service are becoming more and more varied: yesterday, only voice telephony and a few traditional services, tomorrow, the following services will probably become public or universal: the access to certain data bases, the access to certain television pogrammes considered of general interest, " public billposting " through electronic mail of certain opinions in State managed centres, etc... The management contract, whose subject matter is reduced to the few traditional and monopolistic services, will not be able to take these new universal services into consideration. Subject to what will be said later, the universal service can therefore not be defined once and for all in relation to its object, or to is method of transmission.

This last consideration precisely introduces the last reflection.

4. "Miseries and greatnesses" of the management contract

If this is the evolution of the sector and if tomorrow we wish to defend the idea of a universal service with multiple sides and which needs to be constantly

redefined, what can be the utility of the " management contract " method and if the case arises, what are the changes that can be suggested ?

More specifically, two questions appear relevant in relation to the above mentioned considerations.

-the definition of the universal service : who defines it? what is its subject matter ? (4.1.);
-the operator (s) in charge of the universal service: how can it become mandatory given the different natures of the operator candidates and subsidiarily how can it be financed ? (4.2).

4.1. Variations surrounding the definition of the universal service

The Act of 1991 defines the public service missions generically and leaves room for the managment contract to detail, for each mission, the precise tasks. These details may be re-assessed or adapted according to the procedures provided for under articles 4 and 5.

This distinction between missions and tasks, as well as the concern to have regular adaptations, meets the required flexibility because of the evolution of the subject matter of the universal service (see II.3). The restrictive definition of public service missions is however regretful since it is linked to the monopoly system and the traditional concept of telecommunication public service. In an identical way, the concept of " public telephone boxes " exclusively refers to voice conveyance. Does evolution not require the possibility of access to faxes or electronic letter boxes?

The flexibility which is necessary in the definition of the public service leads to the question of the qualities of the person who is to define it. In this case, does the IBPT which assists the Minister during the signing procedure of the management contract have these qualities ?

These qualities can be summarized as follows: openness to an international dimension, good negatiating capacities, having flexible methods of intervention.

Beside the fact that the status of the IBPT, under direct supervision of the Minister, regretfully leaves it little autonomy, it must be said that it is well implemented in national and international organizations regulating the sector

(for instance, the UIT, the ONP Committe). Regretfully, nothing is said in the Act on the information that has to be provided by the operators in charge with the public service which could appreciably affect the negociation position of the IBPT in its mission of advisor to the Minister.
Last, to the IBPT has not been explicitly granted the power to define the licences, to make recommendations, which are flexible methods of intervention that would be useful even outside the management contract.

4.2. Variations surrounding the questions linked to the potential diversity of the operators in charge of the universal service

The exploitation of not very profitable universal services raises the important issue of financing. The methods laid down in the 1991 Act have the advantage of obliging autonomous public companies to enter, in so far as these services are concerned, in a management contract, in order to safeguard a certain form of autonomy, or else they would run the risk of having conditions, including financial ones, concerning the exploitation of the universal service(s) unilaterally imposed on them by the government (article 3§2 4°) and at the opposite, to pay the monopoly fee. It must be added that (article 9) the tariff structures of the public services might be determined by the management contract.

If the public service activities are granted to other types of operators or fall outside the management contract, the discussions concerning performance, or the financing of these various services shall be determined prior to the grant of the licence whether it is general or granted for each individual service will entirely depend on the negotiating powers between the Belgian state and the company. Has it got competitors ? How will the State verify the budget estimates of the company concerning the expenses and the income of the exploitation of the service ? What type of compensation can the State grant a company in order to convince it to accept to carry out a non-profitable public service ? How will the supervisory Authority (the I.B.P.T.) coordinate the action of the different operators.

The question of the equal sharing of the burdens linked to the exploitation of a public service is a topical issue and probably less transparent than within the management contract.

CONCLUSION

Will the management contract " à la Belge " survive the disapearance of monopolies, the privatization of Belgacom and the arrival of new actors?

Designed in a context in which the public service was not yet distinguished from the public nature of its operator, the management contract appears to be a flexible and transparent method for defining the ever evolving public service tasks.

Do the tendances described above necessarily lead to unilateral methods of regulation such as licences, job specifications, etc.... These methods would probably be satisfactory for the majority of public services. It is however not excluded that the contractual method would be preferable to regulate in specific cases the providing and the financing of certain public services. The changing subject matter and the delayed profitability of these services require a negociation which must reflect the transparent reciprocal undertakings between the State and the private or public operator which could be occulted by a method which could only appear to be unilateral on the face of it.

But, whether the management contract survives, or whether the method is the granting of licences, or the job specification method, tomorrow, even more than today, it will become necessary to recognize in favor of the administrative authority, today the IBPT, tomorrow an european body the adequate methods to " negotiate " in an inventive manner the contents, performance and the financing of universal services.